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AGENCIES, BOARDS AND
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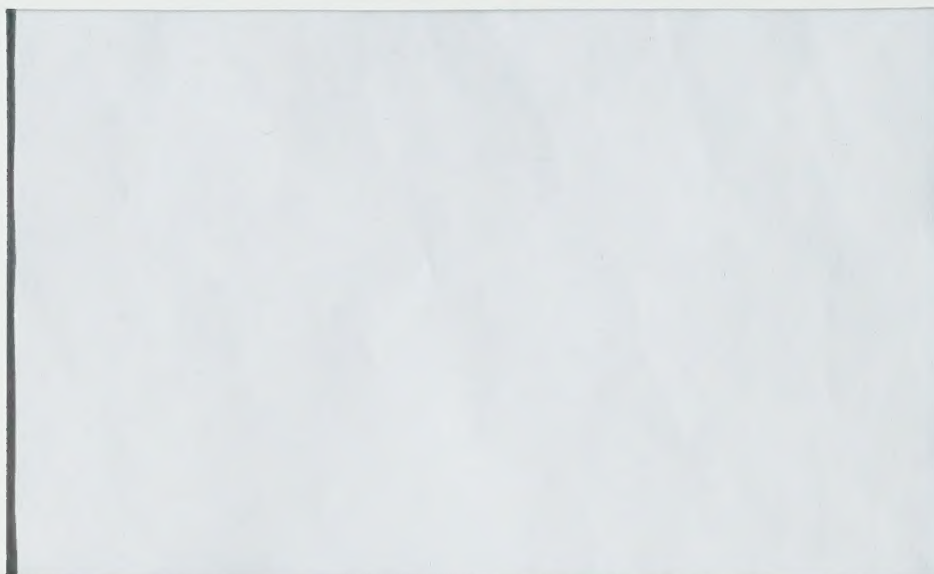
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**SUNSETTING OF GOVERNMENT
AGENCIES, BOARDS AND
COMMISSIONS: THEORY & PRACTICE**

Current Issue Paper 114

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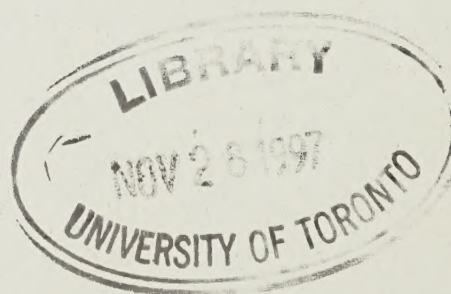


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THE ISSUE

Controlling bureaucratic sprawl is a preoccupation of governments all over the world. In recent years the proliferation of government agencies, boards and commissions (ABCs) which are not directly accountable to the executive or the legislature has been identified as a challenge to the prudent management of the public purse. Many American states have attacked this problem with the policy instrument popularly known as sunseting. A sunset review requires ABCs periodically to justify their existence to the legislature or face termination.

In the late 1970s, legislators in Ontario became concerned about the booming growth in the number of ABCs operated by the provincial government. Ministers admitted in the Legislature that they had lost track of the exact number of ABCs in existence, though they estimated there were well over 600. Ontario is one of the few jurisdictions outside the United States to adopt sunseting as a means of ensuring that ABCs serve the public, perform efficiently, and do not waste taxpayers' money. This paper describes the origins and management of sunset within the Government of Ontario, provides a comparative analysis of how this policy instrument is employed in other jurisdictions, and explores possible reforms which would enable the Legislature to participate in the sunseting process and thereby strengthen its ability to hold the government accountable.

THE CONCEPT

A 'sunset law' has been defined as "the popular name for a statute which provides for the periodic termination of government agencies unless they are able to justify their existence."¹ Under such a law a government agency and the program it operates would continue only after an evaluation by the legislature or one of its committees and an explicit vote to re-establish them. In the words of an American author, "the objective is to replace the assumption that every program automatically continues unless there is a vote to terminate it, with the assumption that every program automatically terminates, unless there is a vote to continue it."² The burden of proof would shift from those who would terminate an agency to those who would renew it. Ideally, a sunset mechanism should compel government agencies to re-evaluate their performance and strengthen the public accountability of the executive to the legislature.

SUNSET LAWS IN THE UNITED STATES

Before examining the Ontario experience it is necessary to consider sunset experiments in the US, since it is there that the idea first prospered and spread.

Introduction

Colorado adopted the first sunset law in 1976, as a result of lobbying by Common Cause, a public interest organization which specialized in mobilizing support for reforms designed to make government more efficient and democratic.. Common Cause's study of the state bureaucracy had concluded that many state agencies suffered from the phenomenon of 'regulatory capture': they had become entrenched bureaucracies which tended to serve the needs of the interest groups they were supposed to regulate. Enthusiasm for the sunset concept soon spread across the US and by the end of the decade approximately three quarters of the states had enacted sunset laws. Sunset became a popular item in Congress, though no statute has ever been enacted at the national level.

Scope of Sunset Legislation³

Sunset legislation may be either selective or comprehensive. Selective sunset legislation would, as the name implies, cover only certain specified state agencies or programs. Alaska is an example of the selective approach. Its review legislation provides for the termination of specific boards and commissions, and for

the mandatory review of various budget categories within agencies which will lead to the termination of selected programs. The actual programs within agencies to be terminated are selected by the Legislative Budget and Audit Committee with the concurrence of the Legislature. Termination dates for the ABCs are set according to a staggered schedule.

Many selective sunset statutes focus on regulatory ABCs. Regulatory sunset legislation affects only those state agencies that licence or otherwise regulate a profession, business, industry or other endeavour. The Colorado Sunset Law is an example of the regulatory approach. It established termination dates for regulatory and registration agencies on a staggered basis.

Comprehensive sunset legislation affects all state agencies and programs that are statutorily created. For example, under the Tennessee Governmental Entity Review Law all state government entities and programs which have as their function the regulation of citizens, business, or industry are subject to sunset review. Termination dates are based on a six-year rotation schedule.

Much of the legislation adopted in the states covers agencies created both before and after the effective date of the sunset act. In such states as Colorado, Florida, Maine and Oklahoma, agencies created after the sunset act comes into effect fall into the termination cycle and are subject to it unless they are recreated by subsequent legislative action. In all states, the sunset act provides that the termination of an agency does not affect the right to institute or prosecute a claim or cause of action against the agency when it occurred prior to the termination of that agency.

Review Process

The most important part of the whole sunset concept is the provision for review and evaluation. Program review and evaluation by the legislature is a precondition in all sunset legislation for the re-enactment of a program, legislation, agency or tax expenditure.

All state laws organize agencies or programs by policy area and thus allow for reviews to be coordinated. Most sunset laws provide that some preliminary evaluation is to be performed by the agency or program under examination and given to the legislative committee which is to make the final recommendation as to its demise or continuation. The complete evaluation of an agency program, legislation or tax

expenditure is done either by the permanent staff attached to the particular committee charged with that task or by some other legislative research, budgetary or auditing body. The legislative committee will then undertake public hearings so that clients and those who are affected by a particular agency or program may present their experiences with it. Once the evaluation has taken place, it is up to the committee to come to a decision and to make a recommendation to the legislature -- the full legislative body is not necessarily bound by this recommendation.

Most of the sunset laws contain criteria by which both the agency under study and the legislative audit bodies are to perform their evaluative tasks. There are basically two sets of criteria which have been adopted either separately or in combination by the 35 states which currently have sunset laws. These criteria are based upon the Colorado and Florida statutes, the first two states to adopt such legislation.

The criteria for agency evaluation set out in the Colorado legislation, which takes the regulatory approach, are:

- 1) Has the agency permitted qualified applicants to serve the public?
- 2) Has the agency or the industry it regulates complied with affirmative action requirements of state and federal statutes and constitutions?
- 3)
 - (a) Has the agency operated in the public interest?
 - (b) Have the agency's operations been impeded or enhanced by existing statutes, procedures and practices of the Department of Regulatory Agencies, and any other circumstances, including budgetary, resource and personnel matters?
- 4) Has the agency recommended statutory changes to the General Assembly that would benefit the public as opposed to the persons it regulates?
- 5) Has the agency required the persons it regulates to report to it concerning the impact of rules and decisions of the agency on the public regarding improved service, economy of service and availability of service?
- 6) Have persons regulated by the agency been required to assess problems in their industry which affect the public?
- 7) Has the agency encouraged participation by the public in making its rules and decisions, as opposed to participation solely by the persons it regulates?
- 8) Has the agency efficiently processed formal public complaints through to completion concerning persons subject to regulation?
- 9) Are changes necessary in the enabling laws of the agency to comply adequately with the above criteria?

The Florida sunset legislation, which takes the comprehensive approach, includes the following evaluation criteria:

- 1) Would the absence of regulations significantly harm or endanger the public health, safety or welfare?
- 2) Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety or welfare?
- 3) Is there another, less restrictive, method of regulation available that could adequately protect the public?
- 4) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved, and if so to what degree?
- 5) Is the increase in cost more harmful to the public than the harm that could result from the absence of regulation?
- 6) Are all facets of the regulatory process designed solely for the purpose of, and have as their primary effect, the protection of the public?

The Decline of Sunset

The popularity of the sunset concept in the US has abated. At the end of the 1970s and in the early 1980s sunset bills were vetoed in Mississippi, West Virginia, Iowa and Michigan; Rhode Island weakened its legislation; and Arkansas, Nevada and North Carolina abandoned sunset reviews. Other states have shifted resources originally devoted to sunset to other forms of legislative oversight.⁴

Several reasons have been advanced to account for the disillusionment with sunset.

Overly-Ambitious Legislation

Common Cause, the most prominent advocate of sunset laws in the 1970s, always maintained that an overly-ambitious law requiring review of all government operations and agencies would over-burden legislators, resulting in superficial evaluations.⁵ For example, Florida's sunset law assigned review dates to more than 100 regulatory agencies. In the second review cycle, time grew short and the entire set of 24 statutes authorizing these agencies was re-enacted at the close of the legislative session.⁶

The Costs of Sunset

Under Colorado's sunset law, the first review cycle covered 13 regulatory agencies. These were evaluated by the state Department of Regulatory Agencies and the state

auditor. This cost an estimated \$175,315, or an average of \$13,332 spent for every agency reviewed; but the combined annual budget for the three agencies which were eventually abolished was only \$6,810.⁷ It cost Florida \$610,000 to conduct three sunset reviews of 62 statutes in 1978-80.⁸ The 1977 North Carolina sunset law had termination dates for the enabling statutes of approximately 100 agencies. The first review resulted in the termination of five agencies, of which only two were active at the time, at a cost of over \$200,000.⁹

The Power of Interest Groups

A 1982 Common Cause report observed that "the threat of close scrutiny under sunset review procedures has galvanized certain licensed professionals to go to great lengths to ensure that regulation which benefits their industry is retained."¹⁰ A comprehensive study of the first two review cycles under Arizona's sunset law concluded that the beneficiaries of the regulations subjected to sunset review in industry and among professionals were the chief participants in the sunset process, and the principal obstacles to regulatory reform.¹¹

A Re-evaluation of Sunset

Common Cause has argued that disillusionment with sunset in the late 1970s and early 1980s was the result of unrealistic expectations about what sunset can do.¹² It is clear that in the US sunset does not mean an immediate reduction in the size of government. Common Causes's 1982 survey of 35 states using sunset laws did provide some encouraging data. Two-thirds of the respondents (i.e., state officials involved in sunset reviews) believed that increased agency efficiency and public accountability had been the principal benefits of sunset.¹³ Since 1976 nearly 1,500 agencies had been reviewed, and of these almost one in five had been terminated, one in three modified, and fewer than half recreated with little or no change. In the majority of states, sunset recommendations were accepted by the legislature 76% to 100% of the time.¹⁴

The most recent comprehensive review of the impact of sunset was conducted in 1989.¹⁵ It reported that 24 states continued to use the sunset process. The review found that most of the states had amended their sunset laws to make them more flexible and selective:

- in nine states ABCs are selected for review on the basis of recommendations made by the legislative committee responsible for sunset, instead of on the basis of a statutorily fixed review schedule. This enables the legislature to avoid re-examining small agencies which have already undergone two or more reviews and do not require further examination in a subsequent cycle;
- the Tennessee Legislature employs a "limited program audit" to apportion reviewing time among agencies in light of agency size, previous audits of the agency, and potential cost savings;
- in 12 states the legislature can choose between a cursory "re-authorization" sunset review or an in-depth evaluation; and
- in Maryland a committee of the Legislature, the Legislative Policy Committee, performs "mini-evaluations" to screen agencies for possible review.

According to this review, ABCs continue to be terminated as a result of sunset scrutinies, although not at the same rate as during the initial review cycles. Between 1984 and 1988 the percentage of reviewed ABCs terminated averaged 13%. The real significance of sunset is that it has provided the states with a mechanism for improving the efficiency of government. Sunset reviews have resulted in innumerable reforms of rules and regulations, designed to improve the procedural efficiency of government. For example, South Carolina has not abolished any ABCs but has implemented over 140 modifications to their operation as a result of sunset directives.

The review found that in many states ABCs themselves have introduced reforms in anticipation of review, indicating that the sunset process has encouraged ABCs to take the initiative in improving their accountability to the legislature.

Finally, the review noted that most of the states which had abandoned sunset were those with legislatures which sat for only a few months in a year, whose members regarded politics as a part-time profession, and who were not supported by a high level of staff and services. Therefore, the decline in the number of states using sunset was not because of dissatisfaction with the results, but because many state legislatures simply do not have the resources and commitment to employ sunset effectively.

SUNSET IN ONTARIO

Introduction

The 1970s was a decade of change and reform in the government of Ontario. Two principle trends can be discerned. On the one hand, the Robarts and Davis administrations implemented a series of measures designed to reorganize and professionalize the bureaucracy for the purposes of launching ambitious policy

initiatives across the entire range of government responsibilities.¹⁶ On the other hand, the Conservatives were confronted with a public which was becoming disillusioned with big government and alienated from the burgeoning bureaucracy at Queen's Park (which was fostered in part by the government's own reforms).¹⁷ The themes of openness and accountability in government became popular in media and political circles, as well as nostalgic evocations of a simple, 'small town' Ontario of yesteryear. The enactment of the Statutory Powers Procedure Act,¹⁸ which reformed the procedures used by ABCs to conduct hearings affecting citizens' rights; changes to parliamentary procedure pursuant to the recommendations of the Commission on the Legislature, which strengthened the capacity of the Legislature to scrutinize the executive; and the introduction of an Ombudsman in 1975 were innovations which attempted to address the public demand for greater accountability and democracy in government without undermining executive control of the policy-making process. The advent of the sunset concept in Ontario politics must be seen against this background. By the late 1970s, Members were accustomed to contemplating proposals for reining in the government machine. It is also true that without a majority (1975-1981), the government was compelled to pay close attention to the mood in the House.

The sunset concept was first raised in the Legislature in 1977, only one year after Colorado introduced the first sunset statute. Members inclined to complain about the great increase in the size of modern government and the near-impossibility of effective legislative accountability began to propose a sunset mechanism as a solution. They suggested that a parliamentary committee be empowered to review Ontario's ABCs with the objective of recommending the termination of those revealed to be redundant. It was pointed out that the rate of growth of ABCs in Ontario was unknown and that the Legislature (not to mention the public) lacked any up-to-date knowledge as to their number, variety and purposes. Members from all three parties supported the idea of a parliamentary committee, including Stuart Smith, the leader of the Liberal Party, David Peterson, New Democratic Party leader Donald MacDonald, and Gordon Walker, soon to become a Conservative cabinet minister.¹⁹

The government responded in the Throne Speech of February 21, 1978. It announced that a reduction in the regulatory burden on the private sector was a priority and to this end a concerted effort would be made to pursue deregulation throughout the public sector (this initiative was eventually formally entitled the Regulatory Reform Program).²⁰ In addition, a committee would be established to review the operation of ABCs. In March a government caucus committee, the Agencies Review Committee, was empowered to pursue this latter objective.

The Agencies Review Committee

This committee was composed of two cabinet ministers and two government backbenchers, and chaired by one of the ministers, the Honourable Douglas Wiseman. Its mandate was:

- to review the need for all provincial agencies, boards and commissions and to recommend, where it would be advantageous:
 - the transfer of the functions of an agency to a ministry, thus eliminating the agency;
 - the merging of two or more agencies with the retention of the functions for which they are responsible; and
 - the elimination of an agency and the functions for which it is responsible.²¹

In November 1978 the Committee issued its first report. It described the criteria it had employed in reviewing ABCs, and announced that "46 agencies have been or will be eliminated, merged or modified."²²

In March 1980 the Committee released its second report. The new chairman, the Honourable Alan Pope, announced three measures:

- 1) All existing advisory agencies were to be sunsetted on a staggered basis, commencing on March 31, 1982. Prior to the termination date for each agency the relevant minister would review its operation and make a recommendation which would be reviewed by Management Board and then the cabinet; a decision to terminate or retain the agency would then be made.
- 2) All new advisory agencies would include a sunset provision in their enacting legislation or regulation. This provision would provide that the agency would terminate on a specified date (which was to be not longer than three years following its establishment) unless positive steps were taken to re-establish it.
- 3) A sunset provision would be included in the legislation or Order-in-Council establishing any new operational or regulatory agency not preparing a corporate plan, unless the cabinet decided otherwise.²³

Mr. Pope added that it was important to "go beyond merely the review of agencies":²⁴ the Report recommended criteria for the establishment and administration of new agencies designed "to ensure that agencies are used in the most effective and efficient manner possible." These criteria were to be incorporated into the Manual of Administration.²⁵

In June 1981 the Committee released its third report. It laid out the procedures, review guidelines and implementation plan guidelines which ministers were expected to follow when undertaking the required sunset reviews. These were now incorporated into the Manual of Administration.²⁶ Therefore, the Report concluded, the time had come to sunset the Agencies Review Committee itself, since sunsetting had become a matter of administration conducted by ministers themselves under the Manual of Administration guidelines.

Subsequent Developments

Since the third and final report of the Agencies Review Committee, Management Board has released two reports on the process of sunset review within the government under the Manual of Administration guidelines, in December 1982 and January 1984 respectively.²⁷ These reports simply list the advisory agencies which have been subject to review since the establishment of the program in March 1980.

Sunset and the Legislature

Before turning to an evaluation of the government's sunset policy, the work of the Standing Committee on Procedural Affairs (later the Standing Committee on Government Agencies) should be considered. The Camp Commission had recommended that a parliamentary committee be assigned to study the ABCs, and accordingly in June 1977 the Legislature assigned the Standing Committee on Procedural Affairs this task. It was to study all ABCs and Crown corporations, "with a view to reducing possible redundancy and overlapping."²⁸ In discharging this responsibility the Committee adopted a *modus operandi* it (and subsequently the Standing Committee on Government Agencies) has followed ever since: the Members selected a cross-section of provincial agencies for review, including a number of large and important ones, held public hearings and invited submissions.

The Committee issued its first report on November 9, 1978. It recommended a one-year moratorium on the creation of new agencies, to provide the government with a period in which it could devise and implement "a comprehensive review of all agencies in Ontario with a view to rationalizing their structures and arriving at an explicit policy on agencies,"²⁹ using the Committee on Government Productivity's and the 1974 Management Board study's guidelines. The moratorium proposal was rejected by the government but the need for a complete rationalization was accepted.

The Committee also recommended the termination of one particular agency, the Ontario Food Council (a recommendation the government eventually implemented). In presenting the report, the Committee's chairman described the Committee's duty to review agencies and recommend their termination where necessary as a sunset function.³⁰ In subsequent reports the Committee has occasionally recommended the termination of an agency. In April 1986 the Legislature transferred the review of ABCs to the new Standing Committee on Government Agencies; its terms of reference, as expressed in Standing Order 104(g), specifically commands the Committee to identify those agencies or parts of agencies which could be subject to sunset provisions.

Evaluation of Ontario's Sunset Procedure

As we have seen, under the policy announced by the Conservative government three categories of ABCs were subjected to sunset review: already-established advisory agencies (that is, existing before March 12, 1980); new advisory agencies; and finally, new operational and regulatory agencies. (Thus operational and regulatory agencies in existence before March 12, 1980 are not covered by the policy.)

Advisory Agencies

According to Management Board, advisory agencies or committees "are generally different from the regulatory and operational types in that they are concerned not with the implementation of government policy but with the inflow of ideas, opinions and expertise into the policy formulation process."³¹ They offer several benefits: specialized knowledge from the private sector; the introduction of fresh viewpoints to balance that of the civil service; the opportunity of the public to participate in government; a sounding board for new policies before they are formally accepted by cabinet; and a conflict resolution mechanism whereby a minister can attempt to have disputing groups resolve their differences without his or her being forced to arbitrate between them. Advisory agencies were more flexible devices than the more rigidly-constituted regulatory and operational agencies, because they could be appointed and dismissed at will by the minister under permissive statutory authority or order-in-council.

In its 1974 study, Management Board criticized the operation of Ontario's advisory bodies. While some had made important contributions, others had proven less successful. The Board identified four problems:

- 1) The government had failed to provide clear, specific terms of reference, such that many advisory committees and agencies spent an inordinate amount of time attempting to determine what their mandate actually was.
- 2) Because no clear role was established, it was often difficult to determine appropriate criteria for membership.
- 3) Many advisory bodies initially established to cope with a specific problem continued an intermittent existence, when they should have been given a limited life span.
- 4) Many advisory committees and agencies' reports were ignored, such that another committee would often be set up subsequently to study the same question.

As the Agencies Review Committee put it, "advisory bodies are often established with less rigorous evaluations than those afforded regulatory or operational agencies."³² In this light it is worthy of note that in the internal governmental review whose results were announced in the Agencies Review Committee's first report in November 1978, 11 of the 17 terminations recommended were of advisory committees or agencies.

Table One reports the results of the government's sunset review of all advisory agencies or committees in existence when the policy was announced in March 1980.

TABLE ONE

Year	Reviewed in this Year	Terminated	Kept	Review Date Deferred or Extended	Consoli- dated	Other	% Kept Unchanged	% Term- inated
1981/82	44 ¹	9	28	2	2	3 ²	64%	20
1982/83	28	7	16 ³	5	—	—	57%	25%
1983/84 ⁴	23	4	16	3 ⁵	—	—	52%	17%

1 The Committee cites 39 of the total chosen, but counting severally the number is 44.

2 Denotes agencies whose functions were transferred to other ABCs.

3 This includes one which as a result of the review was upgraded to an operational agency.

4 This group includes the remainder of the original list, reviews of those deferred from the previous years, and re-reviews.

5 This includes one which was reviewed but whose date for a sunset review proper was extended.

Note: all tables are based on data provided by officials in the Management Board of Cabinet.

TABLE TWO

Table Two reports the results of the government's sunset review of all advisory agencies or committees created after March 1980.

Year	Established in this Year ¹	Term- inated	Kept	Other	% Kept	% Term- inated	Reviews Scheduled for Future Dates
1980/81	1	1	-	-	0%	100%	-
1981/82	6	1	5	-	83%	17%	-
1982/83	4	2	2	-	50%	50%	-
1983/84	4	1	3	-	75%	25%	-
1984/85	7	2	5	-	71%	29%	-
1985/86	6	-	3	3 ²	50%	0%	-
1986/87	7	1 ³	1	-	14%	n/a	5
1987/88	4	2 ³	2 ⁴	-	n/a	n/a	-
1988/89	2	-	-	-	n/a	n/a	2
1989/90	0	-	-	-	-	-	-

- ¹ This refers to the year the agency was established, not the year it received review, which varies from agency to agency (all will receive review within 5 years of their creation).
- ² Denotes (a) 1 which did not get review but was replaced by an agency; (b) 1 which got review and life extended; and (c) 1 which got review and whose functions were transferred to another agency.
- ³ Terminated without review.
- ⁴ No sunset review data listed but noted "continued" in existence until reviews in 1990 and 1991 respectively.

Noteworthy are the relative number of terminations each review generated. One would expect the first review of existing agencies to result in a higher termination rate, since it was the government's evaluation of the existing system (as revealed in the 1974 Management Board study and the first report of the Agencies Review Committee) which led it to conclude that a sunset procedure was desirable. Even if we add to the terminations recommended by the first review those resulting from the preliminary work reported by the Agencies Review Committee in 1978, however, the

number of terminations of new advisory agencies (with the exception of two years, 1981-82 and 1985-86) is still relatively high. (It should be recalled as well that the new advisory bodies were only established in the first place if they survived scrutiny under the new Manual of Administration criteria designed to forestall the creation of unnecessary agencies.) Because we have no way of independently evaluating the work of the Agencies Review Committee it is impossible to say why this should be so.

Regulatory and Operational Agencies

Table Three reports the results of the government's sunset review of regulatory and operational agencies established after March 1980.

TABLE THREE

Year	Estab- lished in this Year	Term- inated	Kept	Review Waived	Other	% Kept	% Term- inated	% Waived	Reviews Scheduled for Future Dates
1980/81	3	1 ²	1	1	-	33%	33%	33%	-
1981/82	6	2 ³	2	2	-	33%	33%	33%	-
1982/83	4	1 ⁴	3	-	-	75%	n/a	0%	-
1983/84	9	-	6	3	-	67%	0%	33%	-
1984/85	6	1	2 ⁵	2	-	33%	16%	33%	1
1985/86	7	-	7 ⁶	-	-	86%	0%	0%	-
1986/87	3	2 ⁷	-	-	-	n/a	67%	0%	1
1987/88	7	-	-	-	6 ⁸	n/a	n/a	0%	1
1988/89	1	-	-	-	1 ⁸	n/a	n/a	0%	-
1989/90	3	-	-	-	-	n/a	n/a	0%	3

- 1 This refers to the year the agency was established, not the year it received review, which varies from agency to agency (all will receive review within 5 years of their creation).
- 2 This agency was reviewed in 1983-84, and its responsibilities were transferred to another agency which was reviewed and retained.
- 3 This includes 1 agency (the Idea Corporation) which did receive a review in 1985-86, but was terminated independently from the sunset process.
- 4 This agency (the Inflation Restraint Board) was scheduled for review in 1985-86, but was terminated independently from the sunset process.
- 5 Includes one which did not receive a date for the next sunset review but instead will be reviewed if its existing legislation is reviewed.
- 6 Includes 1 exempted from further review because of a change in its legal status (Science North, formerly the Sudbury Science Centre).
- 7 Denotes 2 scheduled to be terminated in November 1989, one without review, and the other after a review.
- 8 No date for a review for these listed.

These agencies had also been subjected to the Manual of Administration criteria for the creation of new governmental bodies. Not surprisingly, the termination rate for this category is on the average not as high, since the creation of a regulatory or operational agency is a more substantial matter than that of an advisory body and not likely to be undertaken lightly. The data suggests that cabinet's power under the policy to waive the sunset review of agencies in this category has not been used indiscriminately as a means of avoiding the process.

Conclusion

It is difficult to draw any firm conclusions about the success of sunset review in Ontario as long as it remains an internal governmental process. We cannot properly evaluate the reviews in the absence of the information available to the decision-makers (the Minister, Management Board and cabinet respectively). Nevertheless, the statistics do suggest that sunset review is a meaningful exercise. The termination rate for all three categories of ABCs is by no means negligible.

The Ontario experience does demonstrate a potential benefit of the sunset concept sometimes ignored by its critics. It has been argued that because sunset is a method for automatically terminating ABCs it is "premised on the view that less government is better government,"³³ a simplistic deregulation ethic too crude for controlling modern government. In fact, sunset review generated results other than recommendations for the simple retention or abolition of ABCs. As a result of the sunset reviews, the functions of three of the previously-established advisory agencies were transferred to other bodies (see the notes to Table One); one of the new advisory agencies was replaced by another authority and one saw its functions transferred elsewhere (Table Two); and the functions of one regulatory or operational agency were transferred to another agency (Table Three). Once again, it is difficult to assess the merits of these results as long as sunset remains an internal review process.

NEW DIRECTIONS

Sunset and a New Role for the Legislature

When the Davis government announced the formation of the Agencies Review Committee, opposition Members attacked it as an exercise in public relations. They were skeptical that an internal process directed by the government could satisfactorily scrutinize ABCs to which, they charged, the Conservatives routinely appointed their own supporters. They called instead for a sunset law which would empower a committee of the Legislature to exercise the oversight function. The nearest approximation currently to this, as we have seen, is the Standing Committee on Government Agencies.

Sunset was conceived as a legislative oversight tool designed to strengthen executive accountability to the elected representatives of the people. Ontario's sunset process, however conscientiously conducted by the ministries, Management Board and cabinet, remains an internal review, insulated from the scrutiny of the legislators. If the full benefits of sunset are to be reaped in Ontario a role must be found for the Legislature. Members have argued since the late 1970s that the appropriate mechanism is a legislative committee empowered to hold public hearings and supported by expert staff, as in the US.

Only one jurisdiction in the parliamentary world has empowered a legislative body to conduct sunset reviews. In 1980 the Australian state of Victoria established a parliamentary committee, the Public Bodies Review Committee, with the power to review the efficiency, effectiveness, structure and role of the state's ABCs, and recommend their termination.³⁴

The Committee commences its work once it has received a reference from either Parliament or the cabinet. When reviewing a public body to determine whether it should be terminated, the Committee is required to consider the following statutory criteria:

Whether or not the objects of the body are worth pursuing in contemporary society;

Whether or not the body pursues its objects efficiently, effectively and economically;

Whether or not the structure of the body is suited to the activities it performs;

Whether or not the body duplicates the work of another person or body;

The financial and other liabilities and obligations of the body;

The extent to which the body seeks information as to the effect of its activities and acts on the information it receives;

The extent to which the body considers the public interest when performing its activities;

The extent to which the body encourages public participation in its activities;

The manner in which the body handles complaints about its activities;

The extent to which the body is prepared to improve its structure, composition or procedures.³⁵

When the Committee does recommend that an ABC be terminated, such recommendation automatically takes effect on the anniversary of the Committee's report, unless both Houses of Parliament expressly vote to continue the agency's existence. However, even if Parliament does decide to reject the Committee's recommendation, the Committee is free to review the agency again and repeat its recommendation for termination, to which Parliament must respond in order to prevent the agency's automatic expiry.

If the Committee decides that a public body should continue to exist, then it is required to propose reforms to its structure, membership, procedures, functions and powers, and suggest a date when the agency should next be reviewed.

Another important feature of the Committee is that it is required to conduct its business in open and invite public participation. The Committee is required to advertise the commencement of each review in a daily newspaper circulating throughout Victoria, hold a public meeting to hear comment from the public body under review, and release copies of any reports or studies commissioned by the Committee to the public.

Since its inception the Committee has conducted a number of important and high-profile reviews. The thrust of its reports lies not in the number of outright abolitions of ABCs it has recommended, but rather in its suggestions for structural reforms. For example, as a result of its investigation into the water industry in Victoria, approximately 380 statutory bodies were reduced to 230 and required to adopt improved management practices.³⁶

Before such an entity as Victoria's Public Bodies Review Committee could be adopted in Ontario, several weaknesses in the existing committee structure employed by the Legislature would need to be addressed. The Special Report on the Estimates Process (1988) by the Standing Committee on Public Accounts argued that the committee system in the Ontario Legislature fails to hold the executive accountable in any meaningful way. Members were too overburdened with responsibilities to engage in the time consuming, difficult and often tedious work necessary for government programs, spending and operations to be analyzed satisfactorily, and in any case lacked the political incentive to do so. The Standing Committee pointed out that in examining the estimates, Members tend to use their time for the discussion of broad policy matters or constituency concerns, and not for the estimates themselves.³⁷ It could be argued that Members are unlikely to change their behaviour when serving on a sunset committee. It must be remembered that a sunset review is not a technical exercise but a highly political event: all the interest groups and constituents who benefit from the government programs managed by the ABCs which are threatened with termination will undoubtedly appear at the hearings of the sunset committee, providing its Members with an audience to which they will understandably feel compelled to cater, to one degree or another. In performing their oversight function, Members will inevitably take into consideration the real world of politics.

For Members to undertake their oversight responsibilities effectively, they must be supported by expert staff. The resources available to the committees of the Ontario Legislature have increased considerably in recent years, but they remain insufficient, as the Provincial Auditor in his 1987 report³⁸ and the Standing Committee on Public Accounts have argued. To conduct sunset reviews effectively, legislators need sufficient resources, especially of qualified non-partisan research staff. Moreover, as the Standing Committee has pointed out, once a new or enhanced responsibility is added to the committee system it must be carefully coordinated with existing roles if Members are to employ their limited time efficiently.

The recent Macaulay Report on Ontario's Regulatory Agencies offers some important insights into how sunseting could work in Ontario.³⁹ Mr. Macaulay, an experienced lawyer, past chair of the Ontario Energy Board and Conservative cabinet minister, was appointed by the Peterson government in 1988 to study the operation of ABCs in Ontario. One chapter of his wide-ranging report is devoted to sunset. Mr. Macaulay proposes substantial reforms to the sunset process. He recommends that a legislative committee be struck whose sole responsibility would be the conduct of sunset reviews. Every agency should be required to file a Justification Document with its ministry and Management Board on a revolving basis. In this Document the agency would have to provide a justification for its continued existence. As well, the Ministry should have to prepare its own Justification Document, which would require it to make its own thorough review of the agencies for which it is formally responsible. These Justification Documents would provide the legislative committee carrying out the sunset reviews with the raw material for its scrutinies.⁴⁰

No legislative committee, however dedicated and well prepared its Members, could hope to review all programs and ABCs. Some criteria for selecting a manageable number will have to be developed. In the Standing Committee on Government Agencies, Members select the ABCs for review on the basis of their own interests and, no doubt, after consultation with their respective caucuses. ABCs which are the object of a current controversy are likely candidates for scrutiny. For sunset review to work, however, selection would have to be rigorous and objective. In Tennessee, for instance, the sunset review process allocates more time and resources to the study of major agencies and programs where the potential savings are greater and the services provided are of greater significance.⁴¹

Sunsetting of Regulations

In its comprehensive Second Report (1988), the Standing Committee on Regulations and Private Bills considered the possibility of applying a sunset strategy to regulations, in order to stem their needless proliferation and ensure that Members played a meaningful role in evaluating their effectiveness. The Committee had before it three examples from other jurisdictions to consider.

In 1984 the Australian state of Victoria passed the Subordinate Legislation (Review and Revocation) Act. The Act contains a sunset provision which prescribes various expiry dates for statutory rules. (The definition of "statutory rules" includes regulations made or approved by the Governor in Council.) All statutory rules made after July 1, 1982 are automatically revoked 10 years after they come into force.

In 1986 the Australian state of Queensland enacted a law devoted entirely to sunseting. Entitled the Regulatory Reform Act 1986, the Act's principal objective is "to provide a mechanism for the review and revocation of out-dated subordinate legislation" (s. 2). A more specific goal is to substantially reduce "the accumulated regulatory burden on business without compromising law and order and essential economic, social and environmental objectives" (s. 2(a)). The Act stipulates different expiry dates for subordinate legislation on a staggered basis. All subordinate legislation is governed by the Act, unless expressly excluded. An exemption can be made by Order-in-Council, upon the recommendation of the Minister administering the Act. The Act itself will expire on December 31, 1993.

In 1986 the Mulroney government announced a comprehensive regulatory reform strategy. This included a "Regulatory Process Action Plan," under which parliamentary committees would review all regulatory statutes over a 10-year cycle and recommend sunseting action to the federal government. When this Plan was implemented, however, the government dropped this proposal. Instead, the minister responsible for regulatory affairs was entrusted with the task of ensuring that all government departments undertook a program of systematic review and evaluation of all regulatory programs.⁴²

The Standing Committee on Regulations and Private Bills decided to reject the Australian policy of a general sunset law providing for the automatic expiry of most regulations, and Ottawa's emphasis on the prominent role to be played by cabinet. It considered the role of backbench Members to be especially important. Accordingly, the Committee recommended that the standing committees of the Legislature should evaluate the effectiveness of government regulations on a rotating basis such as to cover all of them over a seven- to 10-year cycle. The Standing Orders would be amended to require the committees to allocate a specific number of hours to this function.⁴³

The virtue of this proposal is its modesty, compared to more ambitious proposals for a sunset law mandating legislative examination of all government programs or ABCs. In contrast, the Progressive Conservative party of Ontario has proposed that all legislation creating any new revenue measure or tax expenditure be sunsetted, so that any such measure would automatically expire after a set period of time and could only be continued after review by the ministry and an appropriate committee of the Legislature.⁴⁴ While it is true, as the Provincial Auditor pointed out in his 1987 report, that tax expenditures in particular are not now adequately scrutinized, either by cabinet or the Legislature, the Conservatives' proposal would require a substantial increase in the research and support resources available to the responsible legislative committee, given the complex nature of fiscal and tax policy.

CONCLUSION

The sunset concept is a potentially-important oversight tool for legislators seeking to secure for their constituents what senior British civil servant Sir Douglas Wass identified in his Reith Lectures as the essential requirements of a good system of government: efficiency and responsiveness.⁴⁵ Common Cause has identified 10 general principles applicable to any sunset plan. Most American states with sunset, including the pioneering Colorado law as well as a Model Bill proposed by the Harvard Legislative Research Bureau, adhere to these principles.

The 10 principles espoused by Common Cause are:

- First:** Programs and agencies should automatically terminate at a certain date unless affirmatively recreated by law.
- Second:** Termination should be periodic (e.g., every seven or nine years) in order to institutionalize the program review process.
- Third:** Like all significant innovations, introduction of the sunset mechanism will be a learning process and should be phased in gradually.
- Fourth:** Programs and agencies in the same policy area should be reviewed simultaneously in order to encourage coordination, consolidation and responsible pruning.
- Fifth:** Existing entities (e.g., budget and planning offices, legislative auditor) should undertake the preliminary program evaluation work, but their evaluation capacities must be strengthened.

- Sixth:** In order to facilitate meaningful review, the sunset proposal should establish general criteria to guide the program evaluation process.
- Seventh:** Substantive preliminary work must be packaged in manageable decision-making reports for top decision-makers to use in exercising their common sense political judgment.
- Eighth:** Substantial committee reorganization is a prerequisite to meaningful sunset review.
- Ninth:** Safeguards must be built into the sunset mechanism to guard against arbitrary termination and to provide for outstanding obligations and displaced personnel.
- Tenth:** Public participation in the form of public access to information and public hearings is an essential part of the sunset process.⁴⁶

Sunset is no simple panacea for the problems of bureaucratic sprawl endemic to modern government. It is far easier for legislators to succumb to the lobbying of well-organized interest groups intent on retaining the programs they benefit from than to organize the more diffuse constituency which might profit from a reduction in bureaucracy or government spending. As the Special Committee of the House of Commons on Regulatory Reform (1980) cautioned, it would be self-defeating for legislators to undertake new responsibilities in the regulatory area if, at the same time, new practices and procedures which allow them to perform these functions effectively are not also adopted.⁴⁷ Despite the enthusiasm expressed by many Members of the Ontario Legislature for the sunset idea, it remains to be seen whether in practice they would be prepared to re-order their priorities and commit themselves to the time required for effective legislative oversight of a sunset law.

Finally, perhaps the most serious obstacle to sunset or any legislative oversight mechanism is the great difficulty in defining objective and precise criteria for evaluating the effectiveness of government. Elections can offer only the most general indications of the voters' needs from their government, and as a result the identification of the public's needs and the formulation of the best means to satisfy them are largely the responsibility of the government itself. But legislation emerging from the collective and highly bureaucratic decision-making process which is modern government is likely to embody a mixture of objectives and purposes of varying

complexity, which may well be incompatible. All too often, when new programs are formulated in the public sector "massive generalizations about desirability take the place of specific evidence of need."⁴⁸ If nothing else, therefore, sunset offers legislators an opportunity to review the original rationale for ABCs and ask whether their operations and expenditure continue to be in the public interest.

FOOTNOTES

¹Anthony R. Licata, "Zero Base Sunset Review," Harvard Journal on Legislation 14 (1977): 505-506.

²Robert Behn, "The False Dawn of the Sunset Laws," The Public Interest 49 (1977): 104-105.

³This and the following section draw on Philip Rosen, Sunset Legislation (Ottawa: Research Branch, Library of Parliament, 1981), pp. SP9-15.

⁴Mark B. Blickle, "The National Sunset Movement," Seton Hall Legislative Journal 9 (1985): 224.

⁵Licata, "Zero Base Sunset Review," p. 518.

⁶Blickle, "The National Sunset Movement," pp. 215-216.

⁷*Ibid.*, p. 214.

⁸*Ibid.*, p. 216.

⁹*Ibid.*, pp. 225-227.

¹⁰Common Cause (US), Issue Development Office, The Status of Sunset in the States: A Common Cause Report (Washington, DC: Issue Development Office, Common Cause, 1982), p. 30.

¹¹Jonathan Rose, "The Arizona Sunset Experience: The First Two Cycles, 1978-82," Arizona State Law Journal (1985): 403-405, 416. This conclusion is corroborated by Common Cause's nation-wide survey of states' experience with sunset; see Common Cause, The Status of Sunset, pp. 28-31.

¹²Common Cause, The Status of Sunset, p. ii.

¹³See also William Lyons and Patricia Freeman, "Sunset Legislation and the Legislative Process in Tennessee," Legislative Studies Quarterly 9 (1984): 157.

¹⁴Common Cause, The Status of Sunset, p. 30; and Blickle, "The National Sunset Movement," pp. 227-230.

¹⁵Richard C. Kearney, "Sunset: A Survey and Analysis of the State Experience," Public Administration Review 50:1 (1990): 49-57.

¹⁶See Ontario, Committee on Government Productivity, Final Report (Toronto: Queen's Printer, 1973), and Ontario, Management Board of Cabinet, Management Policy Division, Agencies, Boards and Commissions in the Government of Ontario (Toronto: The Board, 1974).

¹⁷This phenomenon was predicted by one of the Committee on Government Productivity's own background studies. See George J. Szablowski, The Public Bureaucracy and the Possibility of Citizen Involvement in the Government of Ontario (Toronto: Committee on Government Productivity, 1971).

¹⁸R.S.O. 1980, ch. 484.

¹⁹Ontario, Legislative Assembly, Hansard: Official Report of Debates, 31st Parliament, 1st Session (3 November 1977): 1457-1469; Hansard: Official Report of Debates, 31st Parliament, 2nd Session (3 June 1978): 3255-3264; and Hansard: Official Report of Debates, 31st Parliament, 2nd Session (28 March 1978): 931-933.

²⁰The minister responsible for this program issued his final report in 1982. Ontario, Executive Council, The Hon. Norman Sterling, Achievements in Regulatory Reform in Ontario (Toronto: The Council, 1982).

²¹Ontario, Executive Council, First Report of the Agencies Review Committee to the Management Board of Cabinet (Toronto: The Council, 1978), p. 1.

²²Ibid., p. 4.

²³Ontario, Legislative Assembly, Hansard: Official Report of Debates, 31st Parliament, 4th Session (25 March 1980): 180. .

²⁴Ibid.

²⁵See statement by the Hon. Mr. McCague in Ontario, Legislative Assembly, Hansard: Official Report of Debates, 31st Parliament, 4th Session (1 May 1980): 1307.

²⁶This is now formally known as the Management Board of Cabinet Directives and Guidelines, but in the text for the sake of continuity the old title is used. See section 6 in both volumes for the sunset provisions.

²⁷Ontario, Executive Council, Report on Sunset Review of Advisory Agencies 1981-82 (Toronto: The Council, 1982); and Ontario, Executive Council, Second Annual Report on Sunset Review of Advisory Agencies 1982-83 (Toronto: The Council, 1984).

²⁸Terms of Reference of the Standing Committee on Procedural Affairs, see Ontario, Legislative Assembly, Journals, 31st Parliament, 1st Session (28 June 1977): 36.

²⁹Ontario, Legislative Assembly, Standing Committee on Procedural Affairs, Report on Agencies, Boards and Commissions (Toronto: The Committee, 1978), p. i.

³⁰See statement by Mr. Breaugh in Ontario, Legislative Assembly, Hansard: Official Report of Debates, 31st Parliament, 2nd Session (7 December 1978): 5801.

³¹Management Board of Cabinet, Agencies Boards and Commission in the Government of Ontario, p. 79.

³²Hon. Alan W. Pope, Chairman, Second Report of the Agencies Review Committee (Toronto: The Committee, 25 March 1980), p. 12.

³³Peter Johnson and Graham White, "To Everything There is an Agency: Boards, Agencies and Commissions," in Government and Politics in Ontario, ed. Donald MacDonald (Toronto: Van Nostrand, 1980), p. 123.

³⁴See Australia, Victoria, Parliamentary Committees (Public Bodies Review) Act, 1980, No. 9367. This Act amended the Parliamentary Committees Act, 1968, Principal Act, No. 7727.

³⁵Ibid., s. 2, being an amendment to s. 48 C(5) of the Parliamentary Committees Act, 1968.

³⁶This description of the Victorian legislation draws on Kevin J. Foley, "The Public Bodies Review Committee of the Victorian Parliament," in Parliament and Bureaucracy, ed. J.R. Nethercote (New South Wales: Hale and Tremonger, 1982), p. 260; Murray Frazer, "Victoria: A Novel System of Parliamentary Investigatory Committees," Parliamentary Affairs 38:1 (1988): 97-113; Frazer and Kathryn McAnalley, "The Effectiveness of the Public Bodies Review Committee," Australian Journal of Public Administration 45 (1986): 239-245; and Jean Holmes et al., "Victoria," in Australian State Politics, ed. Brian Galligan (Melbourne: Longman Cheshire, 1986), pp. 32-35.

³⁷Ontario, Legislative Assembly, Standing Committee on Public Accounts, Special Report on the Estimates Process (Toronto: The Committee, 1988), p. 2.

³⁸Ontario, Office of the Provincial Auditor, Annual Report for the year ended 31 March 1987 (Toronto: The Office, 1987), section 2, pp. 7-15.

³⁹Robert Macaulay, Directions: Review of Ontario's Regulatory Agencies (Toronto: Queen's Printer, 1989).

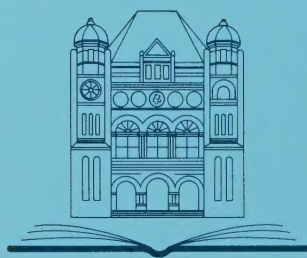
⁴⁰Ibid., chapter 8.

⁴¹Lyons and Freeman, "Sunset Legislation," p. 153.

⁴²See the statement by the Hon. Barbara McDougall, Minister Responsible for Regulatory Affairs, in Canada, Parliament, Minutes of Proceedings and Evidence of the Standing Joint Committee for Regulatory Scrutiny, 33rd Parliament, 1st Session (24 March 1988): 19-20.

⁴³Ontario, Legislative Assembly, Standing Committee on Regulations and Private Bills, Second Report 1988 (Toronto: The Committee, 1988), p. 59. The Peterson government issued a response to the Committee's report; see Ontario, Ministry of the Attorney General, Re: Second Report (1988) (Toronto: Office of the Minister, 8 February 1989). The government's response to this recommendation of the Committee was as follows (p. 4):

This recommendation requires further study. While the government agrees that it would be valuable to implement a procedure to ensure that regulations are regularly reviewed, considerable resources would be required to accomplish this significant task.



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